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Services LLC, d/b/a Pinnacle

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 MUNGER, TOLLES & OLSON LLP  
13 O/B/O AMERICAN MANAGEMENT  
SERVICES LLC, D/B/A PINNACLE,

14 Plaintiff,

15 vs.

16  
17 UNITED STATES DEPARTMENT OF  
THE ARMY,

18 Defendant.  
19

Case No. 13-CV-6890-DDP (MANx)

**DECLARATION OF JONATHAN  
H. BLAVIN IN SUPPORT OF  
PLAINTIFF'S OPPOSITION AND  
CROSS-MOTION FOR SUMMARY  
JUDGMENT**

1 I, Jonathan H. Blavin, declare under the penalty of perjury under the laws of  
2 the United States and the State of California that the following is true and correct.

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4 1. I am an attorney with the law firm Munger, Tolles & Olson LLP  
5 (“MTO”), counsel of record for American Management Services LLC, d/b/a  
6 Pinnacle in the above-entitled action. I am licensed in the State of California and  
7 admitted to practice before this Court. I make this declaration based on my personal  
8 knowledge, and, if called upon as a witness, I could and would testify competently  
9 as to the matters set forth below. I am over the age of 21 years and suffering from  
10 no legal disability.  
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13 2. On September 17, 2012, MTO on behalf of Pinnacle (hereinafter,  
14 “Pinnacle”) filed a Freedom of Information Act (“FOIA”) request for documents  
15 relating to four military housing projects: Monterey Bay, California Military  
16 Communities, Fort Belvoir, and Fort Benning. A true and correct copy of this  
17 request is attached as Exhibit A.<sup>1</sup>  
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20 3. On September 28, 2012, the Assistant Secretary of the Army  
21 (Installation, Energy and Environment) responded to Pinnacle stating that “[a]ll  
22 FOIA requests for the [Residential Communities Initiative] are administered by the  
23 U.S. Army Corps of Engineers, Norfolk Division” and directing Pinnacle to follow  
24

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26 \_\_\_\_\_  
27 <sup>1</sup> Exhibits A through N to this declaration are the same as Exhibits A through N  
28 attached to the Complaint. I attach them here for authentication purposes and for  
ease of reference for the Court.

1 up on its request by contacting the U.S. Army Corps of Engineers, Norfolk Division.

2 A true and correct copy of this request is attached as Exhibit B.

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4 4. By letter mailed October 8, 2012, Pinnacle re-submitted its request to  
5 the U.S. Army Corps of Engineers, Norfolk Division, as directed by the Assistant  
6 Secretary of the Army (Installation, Energy and Environment). A true and correct  
7 copy of this request is attached as Exhibit C.  
8

9 5. The Army did not respond to Pinnacle's request within 20 working  
10 days, as required by law, 5 U.S.C. § 552(a)(6)(A)(i). On October 17, 2012, the  
11 Army sent a letter stating that the records at issue were obtained from a "non-  
12 government source," which I understood and later confirmed to be Clark Realty  
13 LLC ("Clark"). The Army stated that "[t]he source must be afforded the  
14 opportunity to present its argument on the legal and substantive issues involved  
15 prior to making an agency determination concerning release." The Army stated that  
16 it expected to receive the source's argument on November 1, 2012, and that  
17 Pinnacle could expect a response to its FOIA request "[s]hortly thereafter." In its  
18 October 17, 2012 letter, the Army instructed Pinnacle to contact a Ms. Colleen Hagy  
19 with questions. A true and correct copy of this letter is attached as Exhibit D.  
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24 6. On November 15, 2012, I called Ms. Hagy for an update on Pinnacle's  
25 pending request. Ms. Hagy reported that the Army did not submit the records to  
26 Clark until October 31, 2012—the day before the Army represented to Pinnacle that  
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1 it would receive a response from Clark. Ms. Hagy told me that she did not expect  
2 the Army to issue a response to Pinnacle's FOIA request until early December 2012.

3  
4 7. On December 5, 2012, I spoke with Ms. Hagy again by telephone. Ms.  
5 Hagy stated that Clark had requested that the Army release virtually no records to  
6 Pinnacle. Ms. Hagy said that the Army's position was that everything should be  
7 released to the extent possible and that the redactions, if any, should be narrowly  
8 tailored. She called Clark's position "unreasonable."

9  
10 8. On January 14, 2013, more than three months after Pinnacle submitted  
11 its request, the Army produced just one heavily redacted document. The Army cited  
12 FOIA Exemption 4 as the support for its redactions. This document relates to the  
13 Monterey project, just one of the four housing projects at issue in Pinnacle's request.  
14 A true and correct copy of the Army's January 14, 2013 response is attached as  
15 Exhibit E.  
16

17  
18 9. Between January 14, 2013 and March 4, 2013, I repeatedly sought to  
19 contact the Army by email and telephone to clarify if any additional documents  
20 would be forthcoming and the reasons for the Army's partial denial. For instance,  
21 on January 24, 2013, I stated, via email, that "we can only assume the Army is  
22 withholding from production several responsive documents." I asked, "Can you  
23 please identify for us the documents being withheld from production, and the basis  
24 for their withholding?" A true and correct copy of this email is attached as Exhibit  
25 F. The Army failed to respond to this email or any of my other communications.  
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1           10.    On March 4, 2013, Pinnacle timely submitted an administrative appeal  
2 of the Army's failure to provide a meaningful and timely production of documents.  
3 A true and correct copy of this administrative appeal is attached as Exhibit G.  
4

5           11.    The Army did not respond to the administrative appeal within 20  
6 working days, as required by law, 5 U.S.C. § 552(a)(6)(A)(ii).  
7

8           12.    On April 9, 2013, Todd Waldman of U.S. Army Corps of Engineers,  
9 Norfolk Division told me via a telephone call that Pinnacle's appeal should have  
10 been filed with a different department of the Army, despite the fact that the  
11 Assistant Secretary of the Army (Installation, Energy and Environment) directed  
12 Pinnacle to submit its request to the U.S. Army Corps of Engineers, Norfolk  
13 Division and that the U.S. Army Corps of Engineers, Norfolk Division itself  
14 directed Pinnacle to submit its administrative appeal to this division.  
15  
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17           13.    On April 9, 2013, Mr. Waldman agreed to forward Plaintiff's request to  
18 a Mr. Ian Clark, in the new division. Mr. Waldman wrote to Mr. Clark, stating in  
19 part (emphasis added):  
20

21                   We sent them [Plaintiff] the files we had after making the  
22 applicable redactions. **However, I do agree with them**  
23 **that we should have had more files here.** I am  
24 assuming there is a gap in getting documents that will  
25 need to be addressed separately. Since you all use the  
26 documents in question, I am transferring the FOIA  
request to you all in the hope that you have the  
documents.

27 A true and correct copy of this email is attached as Exhibit H.  
28

1           14.    On April 9, 2013, my colleague Laura Lin (formerly Sullivan)  
2 contacted Mr. Clark and asked to schedule a call to discuss the pending request and  
3 how Plaintiff might work with the Army to expedite the appeal process. Mr. Clark  
4 left a voicemail message stating that he required additional time to review Plaintiff's  
5 appeal.  
6

7           15.    Between April 10, 2013 and April 29, 2013, Ms. Lin and I repeatedly  
8 sought to contact Mr. Clark and Mr. Waldman by telephone and email regarding the  
9 status of its administrative appeal. A true and correct copy of an email  
10 communication with Mr. Clark reflecting one such outreach effort is attached as  
11 Exhibit I. Both Mr. Waldman and Mr. Clark failed to respond to any of these  
12 communications.  
13

14           16.    On April 29, 2013, Ms. Lin wrote to Mr. Waldman and Mr. Clark  
15 asking for confirmation that the Army intended to respond to Pinnacle's  
16 administrative appeal. I was copied on this email. A true and correct copy of this  
17 email is attached as Exhibit J.  
18

19           17.    On April 30, 2013, Mr. Clark responded to the April 29, 2013 email by  
20 denying any responsibility for Pinnacle's administrative appeal and directing  
21 Pinnacle to contact a fourth division of the Army to seek a response to its request.  
22 Mr. Clark wrote in part, "I am sorry you have the impression I am addressing your  
23 FOIA request." He referred Pinnacle to Mr. Jose L. Burgos for further assistance.  
24 A true and correct copy of Mr. Clark's email is attached as Exhibit K.  
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1           18. On April 30, 2013, Ms. Lin and I contacted Mr. Burgos by telephone,  
2 as directed by Mr. Clark. Like Mr. Clark, Mr. Burgos denied any responsibility for  
3 Pinnacle's administrative appeal. Mr. Burgos directed Pinnacle to contact a fifth  
4 division of the Army and identified Hayley Curry in the Army General Counsel's  
5 Office.  
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8           19. On April 30, 2013, Ms. Lin and I contacted Ms. Curry by telephone, as  
9 directed by Mr. Burgos. I spoke with Ms. Curry and then Ms. Lin sent her  
10 Pinnacle's underlying record request and pending administrative appeal via email.  
11 Ms. Lin asked Ms. Curry to confirm that the Army would respond to Pinnacle's  
12 administrative appeal. A true and correct copy of this email is attached as Exhibit L.  
13

14           20. On May 3, 2013, Ms. Curry told Ms. Lin and me via email that she had  
15 not yet received Pinnacle's administrative appeal from the Army and would not  
16 begin to review Pinnacle's record request until she received the appeal. Ms. Curry  
17 did not acknowledge that she had previously received the appeal paperwork from  
18 Pinnacle on April 30, 2013. A true and correct copy of Ms. Curry's email is  
19 attached as Exhibit M.  
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22           21. On May 24, 2013, more than 75 days after Plaintiff filed its  
23 administrative appeal, Mr. Curry reiterated that she had not yet begun to review  
24 Plaintiff's appeal. She wrote in part, "I am still trying to find out the exact status of  
25 your appeal, which is proving extremely difficult." A true and correct copy of this  
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1 email is attached as Exhibit N. Pinnacle never received any further information  
2 from Ms. Curry.

3  
4 22. Pinnacle initiated this litigation more than one year after submitting its  
5 FOIA request.

6  
7 23. As shown in Exhibits 2 and 4 to the Declaration of Jason Axe, the  
8 Army produced twenty-six additional documents between three and seven months  
9 after Pinnacle filed its Complaint.

10  
11 24. On July 11, 2014, Ms. Lin contacted Mr. Axe by email to ask an  
12 assortment of questions related to the declarations the Army filed in support of its  
13 motion for summary judgment. Among other questions, Ms. Lin asked when the  
14 Army performed the searches described in paragraphs 3-8 of Mr. Burgos'  
15 declaration. Ms. Lin also asked multiple questions concerning the Army's record  
16 retention policies. A true and correct copy of this email is attached hereto as Exhibit  
17 O.  
18

19  
20 25. On August 22, 2014, Ms. Lin and I spoke with Mr. Axe by telephone  
21 concerning Ms. Lin's July 11, 2014 email. Mr. Axe explained that it had taken him  
22 some time to receive information from the Army in response to Ms. Lin's July 11,  
23 2014 inquiry.

24  
25 26. During the August 22, 2014 conversation, Mr. Axe stated that the  
26 Army began the searches described in paragraphs 3-8 of Mr. Burgos' declaration in  
27 October 2013.  
28



1           27. During the August 22, 2014 conversation, Mr. Axe further stated that  
2 Mr. Burgos denied any responsibility for Pinnacle's administrative appeal in April  
3 2013 because Mr. Burgos was not, at that time, responsible for Pinnacle's  
4 administrative appeal. Mr. Axe stated that all FOIA administrative appeals are  
5 handed by the Army General Counsel's Office.  
6

7           28. During the August 22, 2014 conversation, Mr. Axe did not identify any  
8 retention policies and said he did not expect he could produce any policies related to  
9 the deletions described in Mr. Burgos' declaration.  
10

11           29. Attached hereto as Exhibit P is a true and correct copy of a publication  
12 titled, "A History of the U.S. Army's Residential Communities Initiative, 1995-  
13 2010" as downloaded from the "RCI History" tab of this Army website:  
14 <http://www.rci.army.mil/>. The publication states that it was "Prepared for the Office  
15 of the Assistant Secretary of the Army, Installations, Energy & Environment[.]"  
16

17           30. Attached hereto as Exhibit Q is a true and correct copy of Army  
18 Regulation 25-400-2 titled, "The Army Records Information Management System  
19 (ARIMS)" as downloaded from this Army website: <http://www.apd.army.mil/>.  
20

21           31. Attached hereto as Exhibit R is a true and correct copy of Army  
22 Pamphlet 25-403 titled, "Guide to Recordkeeping in the Army" as downloaded from  
23 this Army website: <http://www.apd.army.mil/>.  
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25           32. Attached hereto as Exhibit S is a true and correct copy of a record  
26 entitled, "Installation Management and Field Organizations" as downloaded from  
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1 this Army website: <https://www.arims.army.mil/ARIMS/RRSA/Search.aspx>.

2 Exhibit R describes the record retention schedule for certain records created during  
3 the design, funding, and award stages of construction contracts and provides that  
4 these records must be retained for “6+” years.  
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8 I declare under penalty of perjury under the laws of the United States of  
9 America and the State of California that the foregoing is true and correct.

10 Executed at San Francisco on August 26, 2014.  
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12

13 /s/ Jonathan H. Blavin  
14 JONATHAN H. BLAVIN  
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